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AXA Affin Assurance Bhd v MTD Construction Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1600 OF 2011
ABDUL WAHAB PATAIL, MOHAMAD ARIFF AND ANANTHAM KASINATHER JJCA
20 MAY 2013

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Insurance — Construction of policy — Terms of policy — Whether literal construction must prevail — Whether respondent had obligation to give notice of its claims within 14 days of occurrence of each and incident

D

Insurance — Contractor's all risk policy — Claims — Major slope failures occurred at project site — Claims for cost of repairs undertaken by respondent — Whether immediate cause of slope failures was a 'faulty design' — Whether appellant had discharged burden of proving that slope failures and landslips were due to faulty design — Whether liability attached to appellant — Whether respondent failed to comply with requirement to give appellant 14 days' notice of loss or damage — Whether appellant's liability under policy was limited to 50% of losses incurred by respondent

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The Government of Malaysia employed the respondent as the main contractor for the design, construction, completion and maintenance of the road transportation between the states of Perak And Pahang ('the project'). The respondent's scope of work under the project was governed by the 'Need Statement' agreed between the parties. On 16 May 1996, the respondent procured a contractor's all risk policy ('the CAR policy') from the appellant. When major slope failures occurred at the project site, during the period between June 1998 and March 2001, the respondent made claims under the CAR policy. In March 2003, the respondent submitted a consolidated claim for RM38,586,234.06 for the cost of remedial works undertaken by the respondent as of that date. When the appellant failed to respond favourably to the respondent's claim, the respondent filed a claim for the recovery of the costs of all repairs done on the slope failures amounting to RM38,586,234.06. In response the appellant submitted that the immediate cause of the slope failures was a 'faulty design', for which no liability attached to the appellant. The appellant also submitted that the respondent had breached the proviso to condition 5 of the CAR policy, which required the respondent to notify the appellant for loss, damage or liability within 14 days of its occurrence. Further, the appellant argued that there had been material non-disclosure of some 13 slope failures before the second renewal of the CAR policy on 11 May 2001. Thus, it was the appellant's contention that it was entitled to avoid liability for

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the three landslides occurring thereafter. Finally, the appellant submitted that even if it was liable, its liability was limited to 50% of the losses incurred by the respondent by reason of the ratable proportion clause in the CAR policy. The respondent contended that the relevant terms of the CAR policy had to be read together with the Need Statement. As such, the respondent submitted that the question of whether the construction was faulty in terms of its design did not arise so long as the construction was in accordance with the Need Statement. After having examined the evidence of the experts from both sides, the trial judge ruled that the defence of faulty design did not avail the appellant because the respondent's construction was in strict compliance with the Need Statement. The trial judge also ruled that the respondent had furnished notice of the incidents giving rise to the claims within the contractual period of 14 days and that the appellant had renewed the policies in the years 2000 and 2001 with knowledge of the slope failures, which precluded them from relying on the defence of non-disclosure. The trial judge thus granted judgment in favour of the respondent and hence the present appeal.

Held, allowing the appeal in part with costs of RM15,000 and ordering the deposit to be refunded to the appellant:

(1) The trial judge had correctly ruled that the defence of faulty design ceased to be relevant once it was established that the construction had been undertaken in accordance with the contract or the Need Statement. However, the trial judge equated the words 'faulty design' with negligence and to the extent the respondent was not negligent, dismissed the appellant's denial of liability based on faulty design. Based on the authority of *Queensland Government Railways v Manufacturers' Mutual Insurance Ltd* [1969] 1 Lloyd's Rep 214 (*the Queensland Government Railway*'s case), which was on point with the present case, the test to determine whether the slope failures were due to faulty design was not based on whether the respondent was negligent in any way as the trial judge seemed to think but whether the design answered the purpose it was intended for (see para 24).

(2) Be that as it may, the trial judge was correct in finding that on the facts of this case the appellant had failed to discharge the burden of proving that the slope failures and landslips were due to faulty design. Firstly there was credible evidence before the trial judge that in the case of a project, such as in the present case, that involved a heavy element of geotechnical engineering the probable cause for the failures was the geological discontinuities, which could not be resolved at the design stage. Secondly, it was evident from cases such as the *Queensland Government Railway*'s case that faulty design would manifest itself in the construction failing during the course of construction or shortly thereafter. However, in the present case the evidence suggested that the completed structures had

stood the test of time save in limited areas and a bigger number of failures took place several years after completion (see para 27).

(3) The terms of the CAR policy were clear and thus, the natural construction must prevail. Upon a literal construction of General Condition 5, the proviso to the same and General Condition 1, of the CAR policy there was a clear obligation on the part of the respondent to have given notice of its claims within 14 days of the occurrence of each and every one of the incidents commencing from the first incident on 2 October 1997. Arising from the appellant's failure to do so, the trial judge ought to have dismissed the respondent's claim save for incidents that occurred after 11 May 2001. This is because the appellant renewed the CAR policy on 11 May 2001 with knowledge of the prior incidents (see para 32).

(4) Finally, the appellant could not be required to indemnify the respondent beyond the ratable proportion of liability assumed by it under the shared policy with co-insurers. Thus the appellant's liability under the CAR policy was limited to 50%, with the remaining 50% to be borne by co-insurers (see para 33).

(5) Thus, the order of the High Court was varied by limiting the liability of the appellant to indemnify the respondent for those losses arising from incidents that occurred after 11 May 2001. Further, this liability was limited to 50% (see para 34).

[Bahasa Malaysia summary

Kerajaan Malaysia melantik responden sebagai kontraktor utama untuk reka bentuk, pembinaan, penyiapan dan penyelenggaraan pengangkutan jalan antara negeri-negeri Perak dan Pahang (projek). Skop kerja responden di bawah projek tertakluk oleh 'Penyata Keperluan' yang dipersetujui antara pihak-pihak. Pada 16 Mei 1996, responden mendapatkan polisi semua risiko kontraktor ('polisi SRK') daripada perayu. Apabila tanah runtuh yang teruk berlaku di tapak projek, semasa tempoh antara Jun 1998 dan Mac 2001, responden membuat tuntutan di bawah polisi SRK. Pada Mac 2003, responden mengemukakan satu tuntutan berkelompok berjumlah RM38,586,234.06 bagi kos kerja-kerja pembaikan yang dijalankan oleh responden pada tarikh tersebut. Apabila perayu gagal untuk memberi respons positif kepada tuntutan responden, responden memfailkan satu tuntutan untuk mendapatkan semula semua kos pembaikan yang dilakukan ke atas tanah runtuh yang berjumlah RM38,586,234.06. Sebagai balasan, perayu menghujah bahawa sebab utama tanah runtuh ialah 'reka bentuk bermasalah', yang mana tiada liabiliti dikenakan kepada perayu. Perayu juga menghujah bahawa responden telah melanggar proviso kepada syarat 5 polisi SRK, yang memerlukan responden untuk memaklumkan perayu untuk kerugian, kerosakan atau liabiliti dalam jangka masa 14 hari kejadian. Seterusnya, perayu

menghujah bahawa terdapat ketidakmakluman material mengenai 13 tanah runtuh sebelum pembaharuan kedua polisi SRK pada 11 Mei 2001. Oleh itu, hujahan perayu ialah mereka berhak untuk mengelakkan liabiliti untuk tiga tanah runtuh yang berlaku selepasnya. Akhirnya, perayu menghujah bahawa walaupun ia bertanggungan, liabilitinya terhad kepada 50% kepada kerugian-kerugian yang dialami oleh responden disebabkan klausa bahagian boleh nilai dalam polisi SRK. Responden menghujah bahawa terma-terma relevan polisi SRK perlu dibaca bersama dengan Pernyataan Keperluan. Oleh itu, responden munghujah bahawa persoalan sama ada pembinaan tersebut bermasalah dari segi reka bentuknya tidak timbul selagi pembinaan tersebut menurut Penyata Keperluan. Selepas mengkaji keterangan daripada kedua-dua pihak, hakim perbicaraan memutuskan bahawa pembelaan reka bentuk bermasalah tidak memihak perayu kerana pembinaan responden dibuat mematuhi Penyata Keperluan sepenuhnya. Hakim perbicaraan juga memutuskan bahawa responden telah memberikan notis insiden-insiden yang membawa kepada tuntutan-tuntutan dalam tempoh kontrak 14 hari dan bahawa perayu telah memperbaharui polisi-polisi dalam tahun 2000 dan 2001 dengan mengetahui mengenai tanah runtuh, yang mengecualikan mereka daripada bergantung kepada pembelaan ketidakmakluman. Oleh itu hakim perbicaraan memberikan penghakiman berpihak kepada responden dan oleh itu rayuan ini dibuat.

Diputuskan, membenarkan sebahagian rayuan dengan kos RM15,000 dan pembayaran balik deposit kepada perayu:

(1) Hakim perbicaraan dengan tepat memutuskan bahawa pembelaan reka bentuk bermasalah menjadi tidak relevan apabila dibuktikan bahawa pembinaan telah dibuat menurut kontrak atau Penyata Keperluan. Walau bagaimanapun, hakim perbicaraan menyamakan perkataan 'reka bentuk bermasalah' dengan kecuaian dan setakat responden tidak cuai, menolak penafian liabiliti perayu berdasarkan rekabentuk bermasalah. Berdasarkan autoriti *Queensland Government Railways v Manufacturers' Mutual Insurance Ltd* [1969] 1 Lloyd's Rep 214 (kes *Queensland Government Railways*) yang sama dengan kes ini, ujian untuk menentukan sama ada tanah runtuh adalah berikutan reka bentuk bermasalah adalah tidak berdasarkan sama ada responden cuai dalam mana-mana cara seperti yang difikirkan oleh hakim perbicaraan tetapi sama ada reka bentuk tersebut berpatutan dengan tujuan seperti yang diniatkan (lihat perenggan 24).

(2) Walaupun begitu, hakim perbicaraan benar dalam dapatan bahawa berdasarkan fakta-fakta kes ini, perayu gagal untuk melepaskan beban membuktikan bahawa tanah runtuh disebabkan reka bentuk bermasalah. Pertamanya, terdapat keterangan boleh dipercayai dikemukakan kepada hakim perbicaraan bahawa di dalam kes sesebuah projek, seperti di dalam kes ini yang melibatkan elemen berat

kejuruteraan geoteknikal, sebab yang berkemungkinan untuk keruntuhan merupakan kecacatan geologi, yang tidak akan dapat diselesaikan pada peringkat rekabentuk. Keduanya, jelas daripada kes seperti kes *Queensland Government Railways* bahawa reka bentuk bermasalah akan terbukti dalam keruntuhan pembinaan ketika pembinaan atau sejurus selepas itu. Walau bagaimanapun, dalam kes ini keterangan mencadangkan bahawa struktur-struktur yang disiapkan teguh berdiri tak lapuk dek masa meskipun dalam kawasan terhad dan keruntuhan dalam jumlah yang lebih besar berlaku beberapa tahun selepas disiapkan (lihat perenggan 27).

(3) Terma-terma polisi SRK adalah jelas dan oleh itu, pembinaan asal perlu dipertahankan. Berdasarkan pembinaan literal Syarat Umum 5, proviso kepada syarat tersebut dan Syarat Umum 1 polisi SRK, terdapat kewajipan jelas bagi pihak responden untuk memberi notis tuntutannya dalam jangka masa 14 hari setiap kejadian dan setiap satu insiden yang bermula daripada insiden pertama pada 2 Oktober 1997. Disebabkan kegagalan perayu berbuat demikian, hakim perbicaraan sepatutnya mengetepikan tuntutan responden kecuali untuk insiden-insiden yang berlaku selepas 11 Mei 2001. Ini disebabkan perayu memperbaharui polisi SRK pada 11 Mei 2001 dengan mengetahui insiden-insiden sebelumnya (lihat perenggan 32).

(4) Akhirnya, perayu tidak perlu untuk menanggung rugi responden melebihi bahagian liabiliti boleh nilai yang dianggarkan oleh responden di bawah polisi perkongsian dengan penginsurans bersama. Oleh itu liabiliti perayu di bawah polisi SRK adalah terhad kepada 50%, dengan baki 50% yang perlu ditanggung oleh penginsurans bersama (lihat perenggan 33).

(5) Oleh itu, perintah Mahkamah Tinggi diubah dengan mengehadkan liabiliti perayu untuk menanggung rugi responden untuk kerugian yang timbul daripada insiden-insiden yang berlaku selepas 11 Mei 2001. Seterusnya, liabiliti ini dihadkan kepada 50% (lihat perenggan 34).]

Cases referred to

Cassel v Lancashire and Yorkshire Accident Insurance Co Ltd (1885) 1 TLR 495, QBD (refd)

Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd [1977] 1 MLJ 244 (refd)

Hitchens (Hatfield) Ltd v Prudential Assurance Co Ltd [1991] 2 Lloyd's Rep 580, CA (refd)

Kathirvelu v Pacific & Orient Insurance Co Sdn Bhd [1990] 3 MLJ 312, HC (not folld)

Overseas Assurance Corp (M) Bhd v MSIG Insurance (M) Bhd [2012] 2 MLJ 249; [2011] 8 CLJ 20, CA (folld)

Pentagon Construction (1969) Co Ltd v United States Fidelity and Guaranty Co [1978] 1 Lloyd's Rep 93 (refd)

Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd [1969] 1 Lloyd's Rep 214, HC (refd)

Appeal from: Civil Suit No S1–22–177 of 2005 (High Court, Kuala Lumpur)

Rajendran Navaratnam (Toh Chia Hua with him) (Azman Davidson & Co) for the appellant.

Felix Durairaj (Dorairaj, Low & Teh) for the respondent.

Anantham Kasinather JCA:

THE BACKGROUND FACTS

[1] By a letter of award dated 9 April 1997, the Government of Malaysia employed the respondent as the main contractor for the project known as 'Membina dan Menyiapkan Jalan Simpang Pulai - Lojing - Gua Musang - Kuala Berang, Pakej 2 (Dari Pos Slim, Perak Darul Ridzuan ke Ladang Blue Valley, Kg. Raja Cameron Highlands, Pahang Darul Makmur)' ('the project').

[2] The respondent's scope of works under the project was, inter alia, to carry out detailed engineering design, construct, complete and maintain the road transportation system between Simpang Pulai in the State of Perak and Ladang Blue Valley, Kampung Raja in the State of Pahang, all in accordance with a 'Need Statement' agreed between the respondent and the Government of Malaysia.

[3] The 'Need Statement', inter alia, required the respondent to:

> 4.4 Independent check of Bridge and Slope stabilization
>
> Designs All bridge and Slope stabilization designs shall be independently checked by experts, to be appointed by the Contract, the prior appointment of which is subjected to the approval of the Project Director
>
> 5.7 Design standards, Specification and Guidelines
>
> Unless otherwise stated in this Need Statement or subsequently approved by the Project Director, all designs shall be in accordance with the latest edition of the JKR Design Standard, Specification and Guidelines (appendix A4) and the relevant Malaysia of British Standards, current at the time of contract award

[4] On 16 May 1996, the respondent procured a contractor's all risk policy

('CAR policy') from the appellant. By a special exclusion to s 1 of the policy, by way of Endorsement 115. Clause (d) was deleted and the replacement thereof reads as follows:

> (d) The costs of replacement, repair or rectification of loss or damages to items due to defective material and/or workmanship and/or fault designs, but this exclusion shall be limited to the items immediately affected and shall not be deemed to exclude loss or damage to correctly excluded items resulting from an accident due to such defect materials and/or workmanship and/or fault design

[5] Between June 1998 and March 2001, major slope failures occurred at the project site. Further major slope failures occurred at the project site in January and March 2001. Brief particulars of the location in the project site of these failures and the date of the failures are as follows:

LOCATION	DATE OF FAILURE
Ch 4 + 940m	2 October 1997
Ch 8 + 870 tp 9 +100m	13 January 1998
Ch 9 + 680m	30 July 1998
Ch 12 + 360m	5 November 1998
Ch 14+ 900 to 15 +300m	13 October 1998
Ch 17+040 to 17 +100m	20 August 1998
Ch 19 +780m	15 September 1998
Ch 20 + 600 to 20 + 800m	12 November 1998
Ch 22 + 600 to Ch 2 + 920m	23 March 2001
Ch 23 + 800m	7 January 2001

[6] On or about 22 January 2001, the respondent informed the appellant of the slope failures. The respondent then made claims under the CAR policy. The respondent's claim was met with the request that it furnish further reports and other information pertaining to its claim. On 3 June 2002, the respondent submitted its interim claim No 2 for the cost of repairs done on the slope failures or landslips amounting to RM26,507,510.90 to the appellant's loss adjusters. The respondent had indicated that the cost of repair works at CH 22 + 600 to CH 22 + 90 and CH 23 + 800m could not be finalised at the date of submission because of ongoing repairs. In March 2003, the respondent submitted a consolidated claim which amongst others consolidated claim Nos 1 and 2 totaling RM38,586,234.06 for the cost of remedial works undertaken by the respondent as of that date.

[7] According to the respondent, since the appellant did not respond to the respondent's claim in a timely manner, the respondent by its letter dated

29 September 2004 required the appellant to decide on liability within 30 days of the letter. The respondent treated the appellant's failure to respond favourably to the demand contained in this letter as evincing an intention on the part of the appellant to be not bound by the terms of the policy in particular its liability thereunder. The respondent then proceeded to file this claim for the recovery of the costs of repairs done on the slope failures amounting in all to RM38,586,234.06.

THE ISSUES POSED FOR DETERMINATION BEFORE THE HIGH COURT

[8] With the agreement of counsel for both parties, the learned trial judge formulated the issues for Her Ladyship's consideration to be the following:

(a) whether the slope failures and landslips set out in paras 9 and 11 of the statement of claim were insurable risks under the contractors' all risk policy ('CAR Policy');

(b) whether the slope failures and landslips set out in paras 9 and 11 of the statement of claim were risks covered under the CAR Policy;

(c) whether claim no 1 dated 9 August 2001, claim no 2 dated 3 June 2002 and the consolidated claim of March 2003 ('the claims') under the CAR Policy are due and payable by the appellant, or whether the appellant is entitled to repudiate liability:

  (i) by relying on policy exclusions, including Exclusions (c) and (d) as amended by 'Endorsement 115: Cover for Designer's Risk' and/or

  (ii) by reason of the respondent's breach of CAR Policy conditions, in particular:

    (A) General Condition 3 (failure to take reasonable precautions to prevent loss, damage or liability);

    (B) General condition 5 (failure to give notification within 14 days of the occurrence); and

    (C) General Condition 8 (failure to commence an action within three months of the rejection of their claim in August 2002), and/or

  (iii) by reason of the respondent's failure to disclose material facts prior to the second extension to the CAR Policy being issued;

(d) whether the appellant was entitled to repudiate liability under the exclusionary clauses of the CAR Policy or that the claims were excluded from policy coverage; and

(e) whether the appellant was entitled to repudiate liability on the grounds that the respondent was in breach of the CAR Policy conditions.

THE APPELLANT'S CASE

[9] Learned counsel for the appellant relying an Endorsement 115 set out in para 4 of this judgment submitted that the immediate cause of the slope failures was 'faulty design', a cause for which no liability attached to the appellant. For the meaning ascribed to the words 'faulty design', learned counsel cited the case of *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd* [1969] 1 Lloyd's Rep 214. In this case, the insurer issued an all risks policy to the insured for all loss of or damage to works arising out of or in connection with the insured's contract for supply and erection of a railway bridge. The work was not completed when a flood, higher than any previously recorded, brought down three concrete piers which had been erected in the bed of the river as some of the supports for the bridge. The exclusion clause in question provided that:

> this insurance shall not apply to or include: … (xi) loss or damage arising from faulty design and liabilities resulting therefrom.

[10] In the case of *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd*, Barwick CJ, McTiernan, Kitto and Menzies JJ disagreed with the meaning ascribed to the words 'faulty design' in the award of the arbitrators and instead opined at p 217 of the case that:

> …, we have come to the conclusion that upon a proper construction of the relevant exclusion, the loss which occurred did arise from faulty design. Let it be accepted, as the arbitrator found, that the piers, as designed, failed to withstand the water force to which they were subjected because they were designed in accordance with engineering knowledge and practice which was deficient, rather than because the designer failed to take advantage of such profesional knowledge as there was, nevertheless the loss was due to 'faulty design' and the arbitrator had done no more than explain however, it happened that the design was faulty. We think it was an error to confine faulty design to 'the personal failure or non-compliance with standards which would be expected of designing engineers' on the part of the designing engineers responsible for the piers. To design something that will not work simply because at the time of its designing insufficient is known about the problems involved and their solution to achieve a successful outcome is a common enough instance of faulty design. The distinction which is relevant is that between faulty ie defective, design and design free from defect. We have not found sufficient ground for reading the exclusion in this policy as not covering loss from faulty design when, as here, the piers fell because their design was defective although,

according to the finding, not negligently so. The exclusion is not against loss from 'negligent designing'; it is against loss from 'faulty design', and the latter is more comprehensive than the former.

[11] In the same case, Windeyer J expressed his view on meaning of the same words in this manner:

> … Here we are not concerned with the word 'fault' or 'faulty' as an attribute, importing blame, of a person, or a personified thing. We are concerned with the word 'faulty' as descriptive of an inanimate thing. The words 'faults' and 'faulty' then have a different sense. They, again according to their derivation, connote a falling short; but not now a falling short in conduct or behavior. They designate an objective quality of a thing. It is not up to a required standard. It is 'faulty', because it has defects, flaws or deficiencies … The word can be applied not only to concrete things, but also to plans or designs to be used to produce intended results. … Doubtless a faulty design can be the product of fault on the part of the designer. But a man may use skill and care, he may do all that in the circumstances could reasonably be expected of him, and yet produce something which is faulty because it will not answer the purpose for which it was intended. His product may be faulty although he be free of blame. … The piers failed to stand up in a flood which it might reasonably have been considered might occur and which did occur. It seems to me that into the question whether they were of faulty design there has been intruded unnecessarily a consideration of whether the faults of the design were the result of fault in the designer. In other words, fault in the sense of shortcoming in the static quality and character of a thing has become involved with fault in the sense of shortcomings in conduct and action.

[12] Learned counsel for the appellant then submitted that based on the ratio of the decision of the High Court of Australia in *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd*, a design can be said to be faulty so long as it does not answer the purpose it was intended for; notwithstanding that the construction based on the design was constructed with all skill and care, ie not negligent; and finally the construction was in accordance will all available know how at the time of construction.

[13] According to learned counsel for the appellant, the meaning ascribed to the words 'faulty design' by the High Court of Australia in *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd* is not peculiar to that jurisdiction but has been adopted in all leading insurance text books in the commonwealth. The decision of the English Court Appeal in the case of *Hitchens (Hatfield) Ltd v Prudential Assurance Co Ltd* [1991] 2 Lloyd's Rep 580 and our Court of Appeal in *Overseas Assurance Corp (M) Bhd v MSIG Insurance (M) Bhd* [2012] 2 MLJ 249; [2011] 8 CLJ 20 were cited in support of this submission.

[14] On the defence of late notification, learned counsel referred us to the proviso to cl 5 of the CAR Policy which provided that 'The appellant shall not in any case be liable for loss, damage or liability of which no notice has been received by the appellant within 14 days of its occurrence'. With reference to this defence, we were referred to paras 9–10 of the statement of claim wherein the respondent admitted to having informed the appellant on 22 January 2001 of the incidents of failure in respect of six locations where the dates of failure were from 9 June 1998–28 September 2000. Similarly, in respect of the ten locations of slope failures, we were referred to para 11 of statement of claim. The dates of failure being from 2 October 1997–23 March 2001. According to learned counsel for the appellant, no reasonable explanation was offered during the trial as to why the failure for nine locations (other than the failure of 23 March 2001) were not notified to the appellant until 22 January 2001, including in the case of the other six locations. Based on these facts, learned counsel for the appellant submitted that the respondent had breached the proviso to Condition 5 which required the respondent to notify the appellant within 14 days of its occurrence, at least for the abovementioned locations.

[15] We were then referred to a passage in the text book '*The Law of Insurance Contract*, (5th Ed), 2006' by Malcom A Clarke with Julian M Burling and Robert L Purves. On the subject of late notification and the effect of such delay on the claim, the learned author states that:

> Notice must be given within the time prescribed by the contract or, in the absence of prescription, within a reasonable time. Time usually runs from an event, such as loss, accident or occurrence. If a time is prescribed, the term is strictly construed against the insurer but must be strictly observed by the claimant
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> (Page 810)

[16] Furthermore the CAR Policy stipulates the consequence of any delay in the notification of the claim to be that 'the appellant shall not in any case be liable for loss, damage or liability of which no notice has been received by the appellant within 14 days of its occurrence'. Additionally, Condition 1 of the CAR Policy provides that:

> The due observance and fulfillment of the terms of this Policy in so far as they relate to anything to be done or complied with by the insured … shall be a condition precedent to any liability of the insurers.

Based on the aforesaid passage in the text book and the provisions in the CAR Policy, learned counsel for the appellant contended that compliance with, inter alia, the notification procedures is a condition precedent to liability under the terms of this CAR Policy as acknowledged by the court in the case of *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244.

[17] As regards material non-disclosure, learned counsel for the appellant submitted that notwithstanding that all 13 failures occurred before the second renewal of the CAR Policy on 13 July 2000, these incidents were not disclosed to the appellant. Learned counsel than submitted that since the incidents were significant as evidenced by the quantum of the claim now being put forward by the respondent, clearly there had been material non-disclosure of the 13 slope failures before the second renewal on 11 May 2001. For this reason, counsel contended that the appellant was entitled to avoid liability for the landslides occurring thereafter on:

(a) 28 September 2000 at the location Ch 18+600 to Ch 18+940;

(b) 7 January 2001 at the location Ch 23+800; and

(c) 23 March 2001 at the location Ch 22+ 600 to Ch 22+920.

[18] Finally, learned counsel for the appellant submitted that even if the appellant is liable, its liability is limited to 50% of the losses incurred by the respondent by reason of the ratable proportion clause in the CAR Policy. The appellant's ratable proportion under the CAR Policy was limited to 50%. This submission of counsel was based on Endorsement 901 which provides that:

> In respect of any claim under this Policy the liability of each of the above-mentioned Insurers shall be limited to the proportion set against such Insurer's name.

That the appellant's liability is limited to 50%, according to learned counsel for the appellant, is evident from the fact that each of the renewals did not result in the appellant's liability being increased beyond 50%. The case of *Overseas Assurance Corp (M) Bhd v MSIG Insurance (M) Bhd* was cited as authority for the proposition that an insurer will not be liable to indemnify more than its ratable proportion.

THE RESPONDENT'S CASE

[19] It is the respondent's position that the benchmark on which the appellant ought to accept or repudiate liability under the insurance policy must be whether the respondent complied with the 'Need Statement'. In other words, it is the respectful submission of the respondent that the relevant terms of the insurance policy must be read together with the 'Need Statement'. As such the appellant cannot (unless provided for in the 'Need Statement') go beyond or invoke practices of engineering to repudiate liability. In this context, according to learned counsel for the respondent, the respondent had fully complied with the requirements imposed upon it under cll 4.4 and 5.7 of the 'Need Statement' set out in para 3 of this judgment.

[20] Learned counsel for the respondent submitted that the ratio of the case of *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd* is distinguishable in two critical aspects:

(a) in the *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd* case, the court did not have to deal with a contractor who had to perform a contract which required compliance with terms akin to the 'Need Statement'. To the extent that the respondent insured was required in this case to construct, to the knowledge of the appellant, in accordance with the 'Need Statement', the question of whether the construction was faulty in terms of its design does not arise so long as the construction was in accordance with the 'Need Statement'. The ratio in the majority judgment of the Court of Appeal of British Columbia in the case of *Pentagon Construction (1969) Co Ltd v United States Fidelity and Guaranty Co* [1978] 1 Lloyd's Rep 93 was cited as authority for this proposition of law. Based on this proposition of law, learned counsel for the respondent submitted that since the respondent had completed the construction in accordance with the 'Need Statement' the slope failures could not be due to faulty design for the purposes of the CAR Policy; and

(b) the other critical distinction was that the case of *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd* dealt with faulty design of piers — which essentially involves structural engineering whereas the CAR Policy issued by the appellant is in respect of geotechnical engineering. According to PW4:

> There is a big difference between geotechnical engineering and structural engineering in relation to the ground. We deal with the ground and the variability of geology and the uncertainty of ground conditions always gives us special problems that the structural engineers does not have. Structural engineer deals with concrete, steel timber, plastic, materials we can specify and precisely define and understand. We deal with ground, it is full of uncertainty, that is the main difference.

For this reason, it was submitted that the definition of 'faulty design' in geotechnical engineering as regards slope design must differ quite radically from that of structural design as the former is full of uncertainty because it deals with the ground. It was then highlighted to us by learned counsel for the respondent that, in this case, the designs have at all material times been subject to auditing and checking before the designs were implemented thereby rendering them to be clearly fit for the purpose for which they were prepared.

[21] As regards the delay in the notification of the claim, learned counsel contended that generally Condition 5 must be construed to mean that the requirement of the policy is to give notice of an accident that was likely to give rise to a claim on the part of the respondent ie 'one causing damage that could

be considered sufficiently serious to give a rise to a claim under the policy and not to any and every accident however trivial that the respondent may have encountered'. The authority of *Kathirvelu v Pacific & Orient Insurance Co Sdn Bhd* [1990] 3 MLJ 312 was cited for this proposition of law. According to this authority, the 14 days notice period only applied to situations that were sufficiently serious enough to give rise to a claim. The inference being that the landslips in this case were with justification not considered by the respondent to be serious enough to warrant reporting until the completion of a site survey in January 2001.

THE DECISION OF THE HIGH COURT

[22] The learned trial judge correctly ruled that the burden of proving that the landslips and slope failures were caused by faulty design vested with the appellant. Her Ladyship then proceeded to examine the evidence of the experts from both sides before ruling that to the extent the construction was in strict compliance with the 'Need Statement', the ensuing slope failures cannot conceivably be said to be due to faulty design under the terms of the CAR Policy. In this respect, Her Ladyship noted that the 'Need Statement' required 'all bridge and slope stabilization designs shall be independently checked by experts, to be appointed by the contractor, the prior appointment of which is subjected to the approval of the project director'. Upon being satisfied on the evidence before the court that the drawings had been properly checked, audited and approved in accordance with the 'Need Statement', the learned trial judge ruled that that the defence of faulty design did not avail the appellant.

[23] As regards Condition 5, Her Ladyship construed this condition as not imposing any obligation to notify the appellants of any accident within 14 days. According to Her Ladyship, this condition only 'implies that its purpose is purely for ascertaining the loss and damage before any repairs or alteration are effected'. Based on this construction of Condition 5, Her Ladyship ruled that the respondent had furnished notice of the incidents giving rise to the claims within the contractual period of 14 days. Finally, Her Ladyship's short answer to the defence of non-disclosure was that the appellant had renewed the policies in the years 2000–2001 with knowledge of the landslips and slope failures and this precluded them from relying on the defence of non-disclosure.

THE DECISION OF THE COURT

[24] The learned trial judge ruled that the defence of faulty design ceased to be relevant once it was established that the construction had been undertaken in accordance with the contract. In this case, in accordance with the 'Need Statement". In other words, Her Ladyship equated the words 'faulty design'

with negligence and to the extent that the respondent was not negligent, Her Ladyship dismissed the appellant's denial of liability based on faulty design. With respect, the authority of *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd* is on point. The test to determine whether the slope failures were due to faulty design is not whether the respondent was negligent in any way as the learned trial judge seem to think but whether the design answers the purpose it was intended for. Generally, it is reasonable to assume that if a building or structure collapses even before it is completed or shortly after it is completed, then, it is likely that its failure was due to design failure.

[25] With respect, in our judgment, the ratio of the case of *Pentagon Construction (1969) Co Ltd v United States Fidelity & Guaranty Co* does not advance the respondent's claim. We opine to this effect because that case concerned the failure of a sewerage plant even before it was commissioned. The failure arose in the following circumstances. Prior the commissioning of the plant, there was a need to weld the steel beams over the top of the tank. The contractor subjected the plant to testing by injecting several hundreds of tons of water before undertaking the welding of the beams. This caused the walls to collapse. The court made a finding of fact that the walls would not have collapsed if the tests had been conducted after the welding of the steel beams had been completed. In other words, the contractors had negligently undertaken the testing of the plant even before it was ready for testing. The issue of faulty design arose in this manner, should the contract have expressly specified that no testing was to take place until the welding was completed? The question posed to the court was whether the failure to include express instructions as regards when the tests were to be conducted can constitute faulty design. His Lordship Justice Robertson writing the majority judgment of the court answered this question as follows:

> My view is that the words 'design' as it is used in the policy expressed a concept of the finished product of the work to be done by Pentagon under the contract and that that concept finds its expression in the plans and specifications; those plans and specifications themselves are not, however, the design. It follows that detailed instructions of how the work of construction is to be carried out are not part of the design of the tank. Consequently, the lack of instructions as to the order in which the welding and the testing were to be done cannot constitute faulty or improper design.
>
> (Page 97 of the judgment)

[26] In other words, the majority judgment was that instructions relating to the implementation of works do not form part of the design and consequently the omission in the contract pertaining to the instructions resulting in the collapse was not due to faulty design. Since the landslips in this case were not caused by instructions or the lack of it, in our opinion, the authority of

Pentagon Construction (1969) Co Ltd v United States Fidelity & Guaranty Co is not relevant on the facts of this case. Accordingly, in our judgment, the ratio of the authority of *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd* represents the law of this country as regards the meaning to be ascribed to the words 'faulty design'. In our opinion, the ratio of this case is the applicable law irrespective of whether the structures were constructed based on structural engineering design or geotechnical engineering design.

[27] Be that as it may, we are in agreement with the learned trial judge that on the facts of this case, the appellant has failed to discharge the burden of proving that the slope failures and landslips were due to faulty design. We opine to this effect for two reasons:

(a) first, there was credible evidence before Her Ladyship that in respect of projects involving a heavy element of geotechnical engineering, the variability of geology and the uncertainty of ground conditions can cause special problems of a nature which are unpredictable. In the circumstances, we are persuaded that the learned trial judge cannot be faulted for accepting the evidence of PW1 that the probable cause for the failures was the geological discontinuities, fault zones, saturation of soil due to high rainfall coupled with high water table. The combination of these unusual factors, according to the respondent's experts could not have been reasonably assessed and resolved at the design stage. In other words, some of these factors were so exceptional that they could only be assessed during the construction of these slopes and, in some cases, after the incident; and

(b) secondly, it is evident from the cases of faulty design that more often than not, faulty design will manifest itself in the construction failing either during the course of construction or shortly thereafter as in the case of *Queensland Government Railways and Electric Power Transmission Pty Ltd v Manufacturers' Mutual Insurance Ltd*. In this case, the construction commenced in 1997 and although there were some failures in 1997–1998 the evidence suggest that the completed structures have stood the test of time save in limited areas and a bigger number of failures took place several years after completion. It must not be overlooked that in terms of quantum, the claims of the respondent are relatively small compared to the overall size of the contract valued in excess of RM280m.

[28] Accordingly, in our view, the aforesaid facts justify the finding of the learned trial judge that, on the balance of probabilities, the respondent failed to discharge the burden of proving that the cause of the slope failures was due to faulty design.

A THE DEFENCE BASED ON GENERAL CONDITION 5

[29] This defence is based on the construction to be accorded to General Condition 5 of the CAR Policy which reads as follows:

B

> In the event of any occurrence which might give rise to a claim under this Policy, the Insured should
>
> (a) Immediately notify the Insurer by telephone or telegram as well as in writing, giving a indication as to the nature and extent of loss or damage;
>
> C
>
> (b) …
>
> (c) …
>
> (d) …
>
> The insurers shall not in any case be liable for loss, damage or liability of which no notice has been received by the Insurers within 14 days of its occurrence.
>
> D
>
> Upon notification ….

E **[30]** It is comnnon ground that the respondent first notified the appellant of the incidents on 22 January 2001, a period well beyond the 14 day period imposed under the policy in respect of all the incidents prior that date. Over and above the proviso to cl 5 which seeks to absolve the appellant of any liability in respect of incidents, notice of which is provided after 14 days, the respondent must also contend with Condition 1 of the CAR Policy. Condition 1 states, inter alia, that:

F

> The due observance and fulfillment of the terms of this Policy in so far as they relate to anything to be done or complied with by the Insured … shall be a condition precedent to any liability of the Insurers.

G

[31] Conventional insurance policies always require notice of the loss sustained by the assured to be given to the insurer within a specified time. The purpose of the notice clause is to enable the insurer to test the genuineness of the claim within a reasonably short time of the occurrence of the loss and to ensure that immediate steps are taken to mitigate the consequences of the loss. According to the authors of *McGillivray on Insurance Law* (11th Ed):

H

I

> It is not always easy to decide whether clauses requiring notice of a claim are condition precedent to the liability of the insurer under the policy, or merely terms of the policy for breach of which the insurer's only remedy is to claim damages for the extra expense flowing from the assureds' failure to give notice within the proper time.
>
> (see para 19-035-page 533).

However, the authors of the book concede that it is a matter of construing the policy as a whole to determine whether the obligation to give notice should be treated as a condition precedent. Whilst conceding that the fact that the policies stipulates for notification to be condition precedent is not necessarily conclusive of the matter, the authors acknowledge that where some conditions are expressed to be precedent to liability and other conditions have no such condition attached, it is difficult to avoid giving effect to the difference in expression.

[32] In our judgment, upon a literal construction of General Condition 5, the proviso to the same and General Condition 1, there was a clear obligation on the part of the respondent to have given notice of the claim within 14 days of the occurrence of each and every one of the incidents commencing the first incident on 2 October 1997. In our judgment, where the terms of the policy are clear, as in this case, then, the natural construction must prevail (see *Cassel v Lancashire and Yorkshire Accident Insurance Co Ltd* (1885) 1 TLR 495). In our opinion, the terms of the expressed proviso read with Condition 1 of the CAR Policy clearly manifest an intention on the part of the parties to treat the requirement to give the 14 day notice to be a condition precedent for the appellant to be liable under the CAR Policy. With respect, we are unable to accept the submission of learned counsel for the respondent that there is no such obligation so long as the respondent is of the view (subjective) that the incident may not give rise to a claim under the policy. According to learned counsel for the respondent, any other construction would enable the appellant to defeat a legitimate claim under the policies merely because of the failure of the respondent to give notice of a trivial claim. The case of *Kathirvelu v Pacific & Orient Insurance Co Sdn Bhd* was cited as an authority for this proposition. The learned trial judge relying on this authority ruled that:

> Condition 5 implies that its purpose is purely for ascertaining the loss and damage before any repairs or alterations are affected.

With respect, we beg to differ. In our judgment, the ratio of *Kathirvelu v Pacific & Orient Insurance Co Sdn Bhd* is of no assistance to the respondent's case because that case involved a claim arising from injury to person and the consequences of the injury only manifesting itself after some time. The facts of this case involve incidents which cannot conceivably be described as trivial as evidenced by the magnitude of the rectification costs being pursued by the respondent. Furthermore, for us to accept the submission of learned counsel for the respondent would amount to acknowledging that the criterion to determine whether the incidents may result in a claim to be a subjective one when it must necessarily be an objective test. Finally, we are unable to agree with Her Ladyship's ruling that the sole purpose of notification is to assist in the ascertainment of the loss. With respect, a distinction exists between notification of a claim and notification of a loss. In our opinion, the respondent

would have satisfied the condition precedent provided notice of the claim was lodged within 14 days even if the true extent of the losses was made known later. Arising from the appellant's failure to do so, in our opinion, the learned trial judge ought to have dismissed the respondent's claim based on the incidents save for incidents which occurred after 11 May 2001. In our judgment, claims in respect of incidents after 11 May 2001 should be allowed because the appellant renewed the policy on 11 May 2001 with knowledge of the prior incidents.

[33] Finally, we are in agreement with the submission of learned counsel for the appellant that the appellant's liability under the policy is limited to 50% by virtue of Endorsement 901 that 'in respect of any claim under this policy, the liability of each of the above name insurers shall be limited to the proportion set against such 'insurers'. It is common ground that this proportion represented the appellant's maximum liability, with the remaining 50% to be borne by co-insurers. It is also common ground that this maximum liability on the part of the appellant never increased following each and every renewal of the CAR Policy. In this respect, we adopt the decision of this court in the case of *Overseas Assurance Corp (M) Bhd v MSIG Insurance (M) Bhd* that the appellant cannot be required to indemnify the respondent beyond the ratable proportion of liability assumed by it under the shared policy with co-insurers.

[34] Based on the reasoning above, we made the following orders on the conclusion of the appeal:

(a) we allowed the appeal in part by varying the order of the learned trial judge by limiting the liability of the appellant to indemnify the respondent to only for losses arising from incidents which occurred after 11 May 2001;

(b) we reduced the liability of the appellant to indemnify the respondent pursuant to (a) above, to 50% of the losses payable to the respondent;

(c) we ordered the respondent to pay agreed costs of RM15,000 to the appellant; and

(d) we ordered the deposit to be refunded to the appellant.

Appeal allowed in part with costs of RM15,000 and deposit to be refunded to appellant.

Reported by Kohila Nesan